

JUSTICE COMMITTEE
SCOTTISH BIOMETRICS COMMISSIONER BILL
SUBMISSION FROM THE OFFICE OF THE COMMISSIONER FOR THE
RETENTION AND USE OF BIOMETRIC MATERIAL

1. The Government of Scotland is the first in the world to propose specific legislation about how new biometrics used for policing and criminal justice should be governed. When previous legislation in both Scotland and in England and Wales was passed it was limited to the control of the biometrics then in use by the police: namely DNA and fingerprints. Since then the coming together of three technologies; new biometrics, artificial intelligence and big data analytics, has exponentially improved the capabilities of the new biometrics. There is now a clear probability that the police will want to make use of some of the new biometrics and, certainly in England and Wales, they have already begun experimenting with doing so. That means that a process is needed to decide which biometric uses by the police are in the public interest and how the balance between any such public benefit and the intrusion into the privacy and liberty of the individual citizen will be decided, controlled and overseen.

The Bill now before the Scottish Parliament responds to this need but recognises that the pace of technical change and speed of development in biometrics is such that legislation could easily fail to keep up with such rapid change. What is needed, therefore, is a legislative architecture that can respond to future and as yet unknown change in biometric technologies. The Government's proposal does this by legislating for a set of principles that will provide the basis for a code of practice that can be modified in response to change. The proposal to appoint a Scottish Biometrics Commissioner whose responsibility it is to draw up such a code of practice is so that the code can evolve without the need for further legislation. Further, the Commissioner can report on compliance by the police and criminal justice system with the code. The role of the Biometrics Commissioner in Scotland is therefore central to ensuring that the new legislation has the flexibility to cope with change. This is quite different than the role of the UK Biometrics Commissioner as laid down in the Protection of Freedoms Act 2012 (PoFA). What the two roles do have in common is scrutinising compliance with biometric legislation and keeping Parliament and the wider public informed about biometrics used in policing.

The Scottish Government is right to seek a legal architecture for legislation to govern biometrics that is flexible. Whether the proposed

legal architecture is the only way to do this remains to be seen but Scotland as the pioneers in this area will be watched with interest by many other countries who are thinking about the need for further legislation/governance in the police and criminal justice system's use of biometrics.

2. As already discussed the proposed role of the Scottish Biometrics Commissioner is central to the legal architecture used for the Bill (see (1) above). A main responsibility of the Commissioner, for drawing up and modifying a code of practice, is necessary as a mechanism to respond to the rapid pace of technical change in this area. The requirement to consult with specific interested parties before drawing up such codes is sensible both to ensure that the practical impact of any code is understood and to achieve as broad agreement and therefore support as possible for the code.

It is proposed in the Bill that the oversight of the Scottish Commissioner be limited to biometrics used for policing and criminal justice. However, the debate in England and Wales has now extended beyond use by the police of new biometric technologies to a consideration of their use by private companies in large, often ungated, private spaces that are open to members of the public. The Government of Scotland might wish to consider whether the proposed legislation would cover this.

Further consideration is also needed of whether the new legislation and therefore the oversight of the Scottish Commissioner ought to apply to police forces that operate both inside Scotland and across the UK, such as the British Transport Police and the Ministry of Defence Police.

The Bill creates a requirement for law enforcement bodies to be compliant with the code but does not give the Commissioner enforcement powers. The experience of the UK Commissioner in relation to PoFA is that monitoring and public reporting has been enough to ensure compliance and deal with any non-compliance. The Bill does give the Commissioner an enforceable power to require the provision of information which is not so in the case of PoFA.

There has been a great deal of debate in England and Wales, and a number of legal challenges are outstanding, in relation to the conducting of trials of biometric technologies – specifically the use of live facial recognition - by the police. In addition to the requirement to encourage relevant research it would therefore be useful were the Scottish Commissioner to specifically consider the nature and conduct of trials by those covered by the Bill and for it to be a requirement that this form a part of any code of practice drawn up by the Commissioner.

3. Much of this has been dealt with in (1) and (2) above. The requirement for the Scottish Commissioner to report to Parliament ensures that legislators will be regularly informed as to whether the legislation is working as intended and the powers provided adequate. In services provided by public bodies (such as the police) alternative means of enforcement are not necessary, appropriate or effective. For example, fines for non-compliance levied on public bodies damage those receiving the services rather than the service providers (by reducing the budget for service delivery) and public reporting of compliance failure may be more effective.
4. The proposed appointments process for the Scottish Biometrics Commissioner insulates the appointee from vested interests either in the police or government administration and Ministers. This can only encourage public trust in the Commissioner's role.

In some ways the proposed Scottish Commissioner has a more limited role than that of the UK Biometrics Commissioner in that the legislation is limited to non-national security policing, the compliance by one police force and no caseworker functions. In another respect, however, the Scottish Commissioner has the significant task of drawing up and then revising the code of practice which is not the case for the UK Commissioner. It is difficult to be precise but the proposed budget and staffing seems reasonable for the tasks envisaged.

The Scottish Commissioner is required to engage in public discourse about the use of biometrics in policing and criminal justice. This is something the UK Commissioner does but is not required to do under PoFA and has sometimes been criticised for. Such engagement in public discourse seems to me correct for an independent Commissioner and will develop trust in the role.

The Scottish Commissioner is also required to encourage relevant research and may commission such research. The UK Commissioner has no such remit but in practice has been able to encourage and keep abreast of research. Whilst one piece of research has been carried out for the Commissioner (this was published as an appendix to the Commissioner's 2018 Annual Report) he has no budget for commissioning. Neither is it proposed that the Scottish Commissioner should have a budget for commissioning research. Without such a budget the Scottish Commissioner will only be able to sponsor research which is resourced by others.